No. 83-1495

In the Supreme Court of the United States

OCTOBER TERM, 1983

THORSTEINN LAUFKVIST THORSTEINSSON, ET AL.,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction to consider petitioners' claim that their deportation hearing should be reopened because their counsel failed to raise an affirmative defense of equitable estoppel at that hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-25) is reported at 724 F.2d 1365. The opinion of the Board of Immigration Appeals (Pet. App. 26-34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1984. A petition for rehearing was denied on February 6, 1984. The petition for a writ of certiorari was filed on March 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, who are husband and wife and their daughter, are natives and citizens of Iceland. The husband initially entered the United States on February 7, 1978, as a

nonimmigrant visitor for business purposes. His wife and daughter entered the United States on the same date as nonimmigrant visitors for pleasure. See Section 101(a)(15)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(B). Following their admission and several extensions of stay, petitioners were authorized to remain in the United States until February 6, 1980. Pet. App. 37.

In March 1980, the Immigration and Naturalization Service (INS) denied petitioners' application for a further extension of stay and informed them that they were required to leave the United States no later than April 15, 1980. See Pet. App. 20. Petitioners did not leave by that date, and on May 19, 1980, the INS issued an Order to Show Cause and Notice of Hearing. The Order to Show Cause charged that petitioners were subject to deportation pursuant to Section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), because they had been admitted as nonimmigrants under 8 U.S.C. 1101(a)(15) for a specified time and had remained in the United States for a longer time than permitted.

Petitioners' deportation hearing was held on August 25, 1980. Petitioners appeared with counsel, admitted the truth of the factual allegations, and conceded deportability. However, counsel for petitioners advised the immigration judge that he and the INS had entered into a stipulation that petitioners would be granted nine months within which to depart voluntarily from the United States. The immigration judge found petitioners deportable and granted them nine months within which to depart voluntarily or be deported. Petitioners did not appeal from this decision. On December 31, 1980, the INS granted petitioners' application for extension of their voluntary departure date to March 5, 1981. Petitioners left the United States on March 3, 1981. Pet. App. 20-21, 37.

2. On March 18, 1981, petitioners applied for admission to the United States as nonimmigrant visitors, pursuant to 8 U.S.C. 1101(a)(15)(B), at El Paso, Texas. They were paroled into the United States for completion of inspection and review of their previous file. On March 27, 1981, the INS began exclusion proceedings against petitioners. An exclusion hearing was held on May 14, 1981. Pet. App. 27. Petitioners appeared with new counsel and contended that the INS should reopen their prior deportation proceeding on the ground that their former counsel never asserted a defense based on the doctrine of equitable estoppel. Petitioners testified at the exclusion hearing that a vice consul at the United States Embassy in Iceland had advised them that they would be able to obtain immigrant visas within 12 to 14 months if they invested in American business and that, in reliance on that advice, they had invested substantial sums in an Arizona business. Pet. App. 59-84. The immigration judge stated that petitioners were technically outside of the United States and that they would have to be admitted before the INS could reopen their deportation proceeding. In an oral decision, the judge held that he could not admit petitioners because they were clearly immigrants without valid immigrant visas. The judge ordered petitioners excluded and deported from the United States. Pet. App. 35-39.

Petitioners sought review by the Board of Immigration Appeals, which dismissed their appeal (Pet. App. 26-34). The Board found that petitioners were clearly excludable under Section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20). Without reaching the question whether an alien applicant for admission to the United States may attack a deportation order in subsequent exclusion proceedings, the Board found there had been no gross miscarriage of justice that might justify reopening petitioners' deportation proceeding. The Board concluded that the doctrine of equitable estoppel did not support petitioners' claim and that their

counsel's failure to raise that defense therefore did not constitute ineffective assistance of counsel. Pet. App. 32-33.

3. Petitioners filed a petition for writ of habeas corpus in the United States District Court for the District of Arizona, pursuant to Section 106(b) of the Act, 8 U.S.C. 1105a(b). The district court dismissed the petition for lack of jurisdiction, based on its conclusion that petitioners' real purpose was to obtain reopening of the deportation proceeding. Pet. App. 21.

4. Petitioners then filed a petition for review of the Board's denial of their request to reopen the deportation proceeding. The court of appeals dismissed the petition (Pet. App. 19-25). The court held that under 8 U.S.C. 1105a(c) it lacked jurisdiction since petitioners had failed to exhaust their administrative remedies through an appeal of the deportation order and since they had left the United States following the deportation order. The court rejected petitioners' contention that they nevertheless should be allowed to seek judicial review because their first counsel's failure to raise the defense of equitable estoppel deprived them of their right to due process. The court concluded that petitioners' counsel had made a "tactical decision" not to raise the doctrine of equitable estoppel and that such a decision did not constitute ineffective assistance of counsel. The court of appeals noted that "[b]y entering into a stipulation with the INS instead of contesting [petitioners'] deportability, the attorney was able to secure an extended period during which [petitioners] could liquidate their assets in an orderly fashion and still voluntarily leave the country" (Pet. App. 24).

ARGUMENT

The court of appeals correctly concluded that it lacked jurisdiction to hear petitioners' claim that their deportation hearing should be reopened (Pet. App. 24-25). That conclusion does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Section 106(c) of the Immigration and Nationality Act, 8 U.S.C. 1105a(c), provides that a deportation order "shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order."[1] Here petitioners failed to exhaust their administrative remedies, since they did not appeal the deportation order. Moreover, petitioners left the United States after the deportation order was issued. Thus, as the court of appeals noted (Pet. App. 22), the plain language of 8 U.S.C. 1105a(c) appears to bar judicial review in this case.

2. Petitioners contend (Pet. 8-16) that due process principles nevertheless require reopening of their deportation hearing. They point first (*id.* at 8-13) to their attorney's failure to consult with them concerning whether the defense of equitable estoppel should be raised and second (*id.* at 13-16) to the attorney's failure to raise that defense at the deportation hearing. Assuming arguendo that such a claim may be raised in a subsequent exclusion proceeding,[2] petitioners' contention is without merit.

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[1]In addition, under 8 C.F.R. 3.2, immigration judges and the Board of Immigration Appeals may not consider a motion to reopen deportation proceedings after an alien has departed from the United States.

[2]The Board of Immigration Appeals assumed without deciding (Pet. App. 30) that an alien applicant for admission to the United States could attack a deportation order in subsequent exclusion proceedings in cases involving a gross miscarriage of justice in the deportation proceedings. The Board found no such miscarriage of justice in this case.

We note initially that in the court of appeals petitioners did not claim that the attorney's failure to consult with them constituted a due process violation; rather, they focused solely on the attorney's failure to raise the defense. Neither the court of appeals, the Board of Immigration Appeals, nor the immigration judge addressed the question of the failure to consult. Consideration of such a claim is ordinarily inappropriate. See *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

a. To the extent a right to counsel exists in connection with deportation hearings, it is grounded in the Fifth Amendment and in Section 242(b)(2) of the Act, 8 U.S.C. 1252(b)(2), which provides that INS regulations must require that "the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."[3] Any such right was satisfied here. Petitioners were permitted to retain counsel of their choice; they do not suggest that their attorney was not authorized to practice in deportation proceedings.

The adequacy of performance of petitioners' attorney does not implicate due process concerns. This Court has held that even a court-appointed attorney whose salary is paid by the state does not act "under color of state law" when performing a lawyer's traditional functions in a state criminal proceeding. *Polk County* v. *Dodson*, 454 U.S. 312, 317-325 (1981). A fortiori, the conduct of petitioners' privately retained counsel in advising them and presenting their case during the deportation proceeding would not

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[3]The Sixth Amendment right to counsel is inapplicable, since deportation proceedings are civil in nature. See *Ramirez* v. *INS*, 550 F.2d 560, 563 (9th Cir. 1977); *Barthold* v. *INS*, 517 F.2d 689, 690-691 (5th Cir. 1975).

constitute governmental action for purposes of the Due Process Clause. See *Wainwright* v. *Torna*, 455 U.S. 586, 588 n.4 (1982). If an attorney acts negligently in the course of such a proceeding, he might be subject to a charge of malpractice. Such negligence, however, would not, as a constitutional matter, require reopening of a civil agency proceeding (at least if it had not undermined the fundamental fairness of the proceeding). See *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). The Constitution obviously does not require that civil judgments in favor of the United States be subject to collateral attack on grounds of inadequacy of representation by privately retained opposing counsel.

b. In any event, the record in this case does not even suggest that petitioners' attorney performed inadequately. Petitioners do not complain of his performance except with respect to the estoppel defense. But petitioners' attorney surely was not required to consult with them about each and every decision that arose during the deportation proceedings. Cf. *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983); *Wainwright* v. *Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). In particular, counsel was not required to consult with petitioners about a potential equitable estoppel defense that was of dubious merit in the circumstances of this case. See pages 8-9, *infra*.

Petitioners did not offer any evidence concerning the reason their counsel failed to raise the defense. However, as the court of appeals noted (Pet. App. 23-24), the decision not to raise an affirmative defense appears to have been a tactical choice from which petitioners benefited. The usual period for voluntary departure is 30 days. See 8 C.F.R. 242.5(a)(3). By not contesting deportability, petitioners' attorney was able to persuade the INS to allow petitioners nine months within which to depart voluntarily from the

United States. Thus, petitioners gained a significant amount of extra time in which they could liquidate their assets in an orderly way.

Moreover, petitioners' equitable estoppel defense clearly lacks merit. This Court has consistently held that the federal government may not be equitably estopped, at least in the absence of serious affirmative misconduct. See, *e.g.*, *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961). Cf. *Heckler* v. *Community Health Services of Crawford County, Inc.*, No. 83-56 (argued Feb. 27, 1984). The Board of Immigration Appeals properly concluded (Pet. App. 30-32) that the facts of this case do not show any such affirmative misconduct.

Petitioners contend (Pet. 5-6) that they relied on oral advice of a consul of the United States Embassy in Iceland that they would have no problem obtaining immigrant visas within 12 to 14 months if they invested in American business and that they could obtain extensions of their nonimmigrant visas until the completion of processing of immigrant visas. The Board of Immigration Appeals concluded (Pet. App. 31), however, that it was more likely that petitioners simply misunderstood the consul's comments regarding the nonpreference investor process and his expectation concerning petitioners' priority date. The Board also noted (*ibid.*) that the consul could not be expected to foresee that nonpreference visa numbers would subsequently become unavailable. Even if the consul did render erroneous advice, that would not be sufficient grounds for estopping the INS from performing its statutory duty to enforce the immigration laws. This Court has held that erroneous advice by a government agent does not constitute the sort of affirmative misconduct that would warrant estoppel of the government. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. at 790

(quoting *Montana* v. *Kennedy*, 366 U.S. at 314); *FCIC* v. *Merrill*, 332 U.S. 380 (1947).

Petitioners also contend (Pet. 15-16) that the INS should have been estopped from deporting them because it extended their stay as nonimmigrants on several occasions. Petitioners claim that each time they sought an extension they advised INS personnel that they needed the extension because they were waiting for immigrant visas. However, the Board found (Pet. App. 32) that petitioners assured the INS that they still owned a home in Iceland, that they intended to return to Iceland, and that they would obtain any immigrant visas there.[4] Thus, it appears that petitioners fully understood that the extensions of stay did not entitle them to permanent resident status. In any event, even if INS officials were aware of petitioners' desire to immigrate at the time they considered the requests for extensions of stay, any generosity in granting the extensions surely did not preclude the INS from subsequently taking the position that petitioners could not re-enter the United States with nonimmigrant visas.[5]

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[4]In addition, the administrative record (at 167-171) shows that each time petitioners requested an extension they stated that the request was for "business reasons."

[5]Petitioners' claim that they were denied "any opportunity" (Pet. 13) to present their estoppel defense is incorrect. Petitioners presented testimony relevant to that defense at their exclusion hearing (see Pet. App. 59-84). The Board of Immigration Appeals addressed petitioners' estoppel argument and squarely rejected it (*id.* at 30-32).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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